IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 9, 2007 Session

IN RE: ESTATE OF LOYD R. SHULTS, deceased,

ROBERT L. SHULTS, BARBARA GAIL SHULTS SMITH AND TERRY WAYNE SHULTS
v.
SUZANNE SHULTS

Appeal from the Chancery Court for Sumner County at Gallatin
No. 2005P-83 Judge Tom E. Gray.

No. M2006-02013-COA-R3-CV - Filed February 22, 2008

This appeal arises from a dispute regarding interpretation of Loyd R. Shults's last will and testament, which incorporated by reference his and his wife's antenuptial property agreement. The Chancery Court interpreted Mr. Shults' last will and testament, determining certain property ownership rights acquired by the decedent during his marriage to be his solely. The court also ordered reformation of the testamentary trust, contained within the will, to identify the biological children of the decedent as the remainder beneficiaries. The Decedent's widow, Suzanne Shults, now challenges the Chancery Court's orders, first, arguing her husband's property, while titled solely in his name, should be considered marital property because it was acquired during the marriage. Suzanne Shults also argues the antenuptial agreement between her and her deceased husband indicates his intent to leave the corpus of the trust to her because property acquired during their marriage was to be marital property. We disagree with the appellant's argument and affirm the ruling of the Chancery Court. Cost of this appeal shall be assessed to the appellant, Suzanne Shults.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DON R. ASH, SP.J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J. and ANDY D. BENNETT, J., joined.

Bruce N. Oldham, Oldham & Dunning, LLC, Gallatin, Tennessee, and Paul A. Gontarek, Waller Lansden Dortch & Davis, LLP, Nashville, Tennessee for the appellant, Suzanne Shults

John R. Phillips, Jr., Gallatin, Tennessee, Susan R. High-McAuley, Bone McAllester Norton, PLLC, Hendersonville, Tennessee, and Nathan Harsh, Gallatin, Tennessee for the appellees, Robert L. Shults, Barbara Gail Shults Smith and Terry Wayne Shults.

OPINION

STANDARD OF REVIEW

Will construction is a question of law. In re Estate of Ridley, 2007 LEXIS 514, No. M2006-01109-COA-R3-CV, at 11-12 (Tenn. Ct. App. 2007) citing In re Estate of Eden 99 S.W.3d 82, 87 (Tenn. Ct. App. 1995). As such, the Chancelor's conclusions of law are reviewed de novo, with no presumption of correctness. In re Estate of Vincent, 98 S.W.3d 146, 148 (Tenn. 2003)(quoting Union Carbide Corp v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993)). Any questions of fact will be reviewed with a presumption of correctness unless the preponderance of evidence indicates otherwise. Tenn. R. App. P. 13(d). Trust reformation is allowable only after clear and convincing proof establishes the testator intended the same. Tenn. Code Ann. § 35-15-415.

FACTS

This cause arose subsequent to Loyd R. Shults' ("the Decedent") death on February 3, 2005. A last will and testament, dated February 16, 1987, and holographic codicil, dated October 19, 2002, were recovered. The holographic codicil merely ratified and confirmed his 1987 last will and testament and nominated Terry Wayne Shults as executor, if Robert Loyd Shults could not initially serve as such.

The Decedent and Suzanne G. Shults ("wife") executed an antenuptial property agreement prior to their November 1, 1981 marriage. Within, it stated the parties' pre-marriage property was to remain separate property and property acquired during the marriage would be considered marital property. Specifically, it read:

> THIS agreement is made in consideration of the contemplated marriage of the parties which is expected to be on the 1st day of November, 1981, and in further consideration of the agreements hereinafter set forth between the parties. . . . [1]
>
> III. . . . Separate Property. The parties intend and desire that all property owned respectively by each of them at the time of their marriage, shall be respectively their separate property, except as otherwise provided herein. . . .
>
> VII. In the event the marriage is terminated by death, the surviving spouse shall take only that property acquired during the marriage of the parties and the 98 acre farm. . . .[2]

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1. Provisions I – VI are I. a list of the personal and real property of the parties, II. a list of children by prior marriages, III. the intent of the parties regarding setting forth property rights, establishing a joint account, and separate property, IV. amendment, modification, or rescission, V. additional gifts, and VI. direction for disposition of property in the event of divorce.

2. Clauses VIII – XI are VIII. a direction for the parties to establish life insurance for the benefit of the other spouse, IX. Execution of instrument, X. effective date, and XI. an indication the parties accept the terms of the Ante-nuptial Property Agreement.

Each of the marital parties had been married once before and had separate children born out of those marriages. At the time of his death, the Deceased and his wife were married for twenty-three years.

The Decedent's wife, Robert Loyd Shults ("Robert Shults"), Terry Wayne Shults ("Terry Shults"), and Barbara Gail Shults Smith ("daughter") survived the Decedent.[3] Collectively, they are the beneficiaries of the Decedent's last will and testament. Sherry Jane Shults Brassell, another daughter of the Decedent, predeceased him, leaving no issue. Robert Shults served as the executor of the Decedent's estate.

The Decedent's last will and testament is comprised of four parts. The first section directs the Executor to pay funeral costs and any debts first out of funds coming to him as such Executor. Section two states:

> I have heretofore entered into an antenuptial property agreement with my wife, Suzanne G. Rains Shults, wherein it is stated that each of us own our individual property and it is understood and agreed under Section VII of said Agreement, that in the event the Agreement is terminated by death any property that we might have acquired during our marriage shall become the property of my wife, and the 98 acre farm that we own as tenants by the entirety or right of survivorship shall become her property in fee simple and absolutely.
>
> In Section VIII of said agreement, I have agreed to endorse my insurance and retirement wherein $75,000.00 would be payable to my wife and I have since endorsed the insurance wherein she will receive $100,000.00 of such insurance and retirement, and it is my intention that the balance of the proceeds of the insurance and retirement shall be paid unto my estate.
>
> In the event my wife is not living at the time of my death or we die as a result of a common disaster, the said 98 acre farm, the $100,000.00 of life insurance and retirement proceeds, and any inheritance that I might have received from my wife, Suzanne, shall be distributed, along with property that we have acquired during our marriage, equally among my children and the children of my wife, it being my intention that 50% be distributed among my four children and 50% be distributed among my wife's three children.

Section III of the Decedent's will are devises to the Decedent's wife, his daughter, Robert Shults, the daughter that predeceased him, and Terry Shults. It also directs establishment of a trust stating, "all the remaining portion of my estate shall be held in trust and managed and controlled as my trust estate, and the Trustee shall distribute the income therefrom as hereinafter provided." The trust property is directed as follows:

> 10% of the income to my wife for ten years or for five years with a lump sum of Thirty Thousand ($30,000.00) Dollars at the end of the five year period. Such above stated option shall be within my wife's sole discretion and the balance of said income shall be paid unto my four children in equal proportions, as follows:

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[3] To avoid confusion, the Decedent's sons will hereinafter be referenced by their first and last names.

> 1/4th unto Barbara Gail Shults Smith; 1/4th unto Robert Loyd Shults; 1/4th unto Sherry Jane Shults Brassell; and 1/4th unto Terry Wayne Shults; My trust created by this instrument shall terminate ten years after the date of my death.

The final clause of the will incorporates by reference all the provisions and powers set forth in Section 3 of Chapter 110 of the Tennessee Public Acts of 1963, codified in Tennessee Code Annotated § 35-50-110, which enumerates the administrative powers of the Executor and Trustee. It is in this section the Decedent nominates Robert Shults as the executor of his estate.

The parties brought various separate property to the marriage. The Decedent owned a checking account at Bank of Gallatin approximately valued at two thousand dollars ($2,000.00), fifty thousand dollars ($50,000.00) of life insurance payable to his estate, retirement fund with Gallatin Auto Parts valued at twenty-five thousand dollars ($25,000.00), a retirement fund with the Sumner County Election Commission valued at eight hundred dollars ($800.00), Gallatin Auto Parts' stocks and retained earnings in the amount of two hundred thousand dollars ($200,000.00), other sock valued at seventeen thousand dollars ($17,000.00), one-third interest in a house and lot on Perrolee Street valued at six thousand three hundred fifty two dollars ($6,352.00), and one-half interest in real estate on Locust Street valued at one hundred twenty-five thousand dollars ($125,000.00). Ms. Shults owned a checking account valued at seven thousand, four hundred dollars ($7,400.00), a savings account in the amount of one thousand, three hundred dollars ($1,300.00), a twenty-five thousand dollar life insurance policy ($25,000.00), retirement ad life insurance with the Metro School System valued at thirty-five thousand dollars ($35,000.00) and the Metro Retirement System in the amount of five thousand, three hundred dollars ($5,300.00), personal assets such as jewelry and furniture, one-third interest in a house and lot on Lebanon Road valued at fifty thousand dollars ($50,000.00), one-third interest in real estate on Gallatin Road valued at thirty thousand dollars ($30,000.00), one-third interest in real estate located on Dickerson Road valued at twenty thousand dollars ($20,000.00), and one-third interest in seventeen acres in Sumner County valued at fifty thousand dollars ($50,000.00).

After the marriage, the parties retained control of their property. The parties initially set up a joint banking account; however, Ms. Shults testified for bookkeeping purposes, that arrangement only lasted approximately thirty (30) days. As a result, they established two joint checking accounts, each having signatory rights, but testimony revealed each party used a joint account as their own for income deposits and expenses. Ms. Shults did not withdraw money or write any checks from the joint account the Decedent primarily used. Later into the marriage, the Decedent and his brothers sold Gallatin Auto Parts, and the Decedent received a two hundred thousand dollar ($200,000.00) promissory note. The Decedent also sold the two real properties listed within the antenuptial agreement. He used the proceeds to purchase and re-sell as many as sixteen (16) other properties and various stock. Neither party prevented the other from selling or disposing of property, if their intention was to do so. Ms. Wilda Dodson, with Edward D. Jones Company, testified the Decedent came to her in September 1991, and again on September 24, 2002, to create a trust wholly funded by his separate property. Ms. Dodson testified the assets within the trust totaled three hundred two thousand, eighty-nine dollars and thirty-eight cents ($302,089.32). The Decedent was the trustee and the grantor of the trust account. The record is devoid as to Ms. Shults's treatment of her pre-marriage assets.

The Sumner County Chancery Court, at Gallatin, ordered the Decedent's last will and testament and holographic will admitted to probate on March 15, 2005.

The first issue with the will arose January 30, 2006, when Robert Shults filed a motion for instruction and interpretation as to:

1. Whether Paragraph II of the will fails on the issue of retirement and life insurance and that the IRA made payable to the estate be distributed in accordance with the residuary clause of the will since the Decedent had no retirement other than his IRA and the life insurance policies named the Estate as the beneficiary?
2. Whether 126 Eastover Street, 246 Hollywood Boulevard, and 2,173 shares of Greene County Bancshares, Inc. stock titled solely in Decedent's name, acquired during the marriage, is marital or separate property?

The Chancery Court of Sumner County issued an order, on March 1, 2006, on the foregoing questions finding the Decedent's wife should receive $100,000.00 from the estate in accordance with the Decedent's will, payable from retirement accounts and life insurance proceeds. It also held the IRA shall pass under the residuary clause, and the Decedent's wife shall file her statement with the court regarding issues of the real property and bank shares. In a separate order filed the same day, the Chancery Court stated this matter is better categorized as a matter of will construction and should have been commenced as a complaint for will construction with the surviving spouse named as the defendant. In accordance, the Chancery Court ordered the matter continued so the wife could consult with an attorney, if she so chooses, and file a written response to the Motion for Instructions and Interpretation, which the court will treat as construction of the will.

The Decedent's wife filed her response March 3, 2006 arguing to the Chancery Court the property acquired during the marriage, regardless of title, was meant by the husband and wife to be marital property.

After the August 17, 2006 trial, motions and memorandum of the parties, the Chancery Court issued its order, filed August 25, 2006. The Court found "the Decedent created a testamentary trust with his last will and testament; the Decedent and his wife were married November 1, 1981; the parties executed an antenuptial property agreement prior to marriage; throughout 23 years of marriage, the parties exercised separateness in their affairs; the Decedent and his wife had children by prior marriages; it was the Decedent's intent to maintain separate property and to provide for its distribution by his will; the Decedent prepared and added a holographic codicil on October 18, 2002 evidencing his intent to not die intestate; the Decedent intended for his children to be the beneficiaries of the testamentary trust at its termination; and Tennessee Code Annotated Title 35, Chapter 15 is applicable so that the trust is reformed to provide the children of the Decedent are the remaindermen upon its termination."

ISSUES

The following issues are before the court: (A) Whether the trial court erred in its construction of the Decedent's last will and testament, which incorporated the antenuptial property agreement, that property purchased by the Decedent, during the marriage, but titled solely in the Decedent's name, is separate property, and (B) Whether the trial court erred in its finding the Decedent intended to bestow the corpus of the testamentary trust, created by the Decedent's will, upon his biological children?

ANALYSIS

Both issues before the court involve questions of will construction. The well-founded base for will construction and interpretation is the testator's intent, as expressed within the instrument. See Moore v. Neely, 370 S.W.2d 537, 540 (Tenn. 1963) (stating "the cardinal rule in construction of wills is the court shall seek to discover the intention of the testator and give effect to it"). Courts have discerned testamentary intentions using the testator's express language and through his implications. In fact, it has been said,

> It is written that the will or meaning of the testator is the queen or empress of the testament; because the will doth rule and govern the testament, enlarge and restrain it, and in every respect moderate and direct the same, and is indeed the very efficient cause thereof. The will, therefore, and meaning of the testator ought before all things to be sought for diligently, and being found ought to be observed faithfully. And as to the sacred Anchor ought the judge to cleave unto it, pondering not the words but the meaning of the testator. For although no man be presumed to think otherwise than he speaketh, yet cannot every man utter all that he thinketh, and therefore are his words subject to his meaning. And as the mind is before the voice, (for we conceive before we speak), so is it of greater power; for the voice is to the mind as the servant is to the lord.

Pritchard on the Law of Wills and Admin of Estates, 1-7, § 404 (citing Swinburne on Wills, pt. 1, § iii, at 9, 10). The only well established exception to carrying forth the testator's intent is an instruction which is contrary to law or public policy. Lynch v. Burts, 48 Tenn. 600, 604 (1870).

The most beneficial tool to determine the testator's intent is the will's language itself. The court's duty is a simple one—"expound, not create." Pritchard on the Law of Wills and Admin of Estates, 1-7, § 404 (citing Sands v. Fly, 292 S.W.2d 706 (Tenn. 1956); Davis v. Price, 226 S.W.2d 290 (Tenn. 1949); Gannaway v. Tarpley, 41 Tenn. 572 (1860)). In Nichols versus Todd, the court stated,

> the testator's intention must be ascertained from "that which he has written" in the will, and not from what he "may be supposed to have intended to do," and extrinsic evidence of the condition, situation and surroundings of the testator himself may be considered only as aids in the interpretation of the language used by the testator, and "the testator's intention must ultimately be determined from the language of the instrument weighed in the light of the testator's surroundings,

> and no proof, however conclusive in its nature, can be admitted with a view of setting up an intention not justified by the language of the writing itself.

101 S.W.2d 486, 490 (Tenn. Ct. App. 1936) (quoting Sizer's Pritchard on Wills, §§ 384, 387, 388, and 409 (2nd Ed.)).

Courts may use rules of construction to derive the intent of the testator, to a limited extent. Rules of construction should not in anyway expound, defeat, or alter the intent of the testator. In Daugherty versus Daugherty, the Supreme Court offers its guidance, stating,

> that intention is to be ascertained from the particular words used, from the context and from the general scope and purpose of the instrument. . . Where a will is drafted by a lawyer, technical words used therein must be given technical meanings. . . Every word used by the testator is presumed to have some meaning. . . The will is to be interpreted in the light of the circumstances existing at the time of its execution. . . And it is to be interpreted in the light of its general purpose. . . It is the absolute right of the testator to direct the disposition of his property and the Courts are limited to the ascertainment and enforcement of his directions."

784 S.W.2d 650, 653 (Tenn. 1990). Finally, "there is no principle better settled than that the intention of the testator must be gathered from the whole instrument, and that whatever appears to be the dominant and controlling intent must govern, even if in conflict with some words, phrases, and expressions, which, taken alone and separately, might lead to a different conclusion or interpretation." East v. Burns, 56 S.W. 830, 832 (Tenn. 1899).

Considering the will as a whole may necessitate reference to other documents. Testators have the power to incorporate other pre-existing, written documents into their last wills and testaments via the long-standing incorporation by reference doctrine. To incorporate a separate instrument into a will, thereby giving it testamentary power and force, the decedent must "properly identif[y] and [must] not evade provisions of the statute of wills requiring an attested writing, since the separate writing is considered a part of the will, to which the attested signatures are attached." See Smith v. Weitzel, 338 S.W.2d 628, 635 (Tenn. Ct. App. 1960) (citing Wagner v. Clauson, 78 N.E.2d 203 (Ill. 1948)). If the court determines it is the unequivocal intent of the decedent to incorporate the separate, pre-existing written document, such separate document becomes part and parcel of the last will and testament.

Tennessee statutes provide guidance for the interpretation and force of testamentary trusts created by last wills and testaments. Tennessee Code Annotated Section 35-15-415, also known as the Tennessee Uniform Trust Code, allows courts to reform the terms of a trust. It allows such "to conform the terms of the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." Id. Mistakes of expression include "misstatements of settlor's intention, failure to include a term that was intended to be included, or include a term that was not intended to be included." See Tenn. Code Ann. § 35-15-415 notes. The notes to this section caution that reformation is entirely different from resolution of an ambiguity. Id. The legislature further explains "extrinsic evidence is essential. . . [but] to

guard against the possibility of unreliable or contrived evidence. . . the higher standard of clear and convincing proof is required." Id.

Whether the trial court erred in its construction of the Decedent's last will and testament, which incorporated the antenuptial property agreement, that property purchased by the Decedent, during the marriage, but titled solely in the Decedent's name, is separate property?

This Court agrees with the Chancery's Court's findings, after examining the construction of the Decedent's will de novo. Certainly, the Decedent's testamentary documents, and the content therein, indicate he intended to leave his estate testate. Ordinarily, the plain meaning of the will controls the courts' findings of the decedents' intentions. However, after examining the antenuptial property agreement phrase, "surviving spouse shall take *only* that property acquired during the marriage," this Court finds the Decedent's intention of separate property was not the property's title or date of acquisition, rather the Decedent intended separateness as indicated by the parties martial actions.

The actions of the spouses during marriage extend their intention of separateness well into the marriage. The parties' first expression of their intention to remain separate during marriage was the execution of a valid antenuptial property agreement. At the time of marriage, the Decedent owned fifty percent of stock in his and his brothers' business, Gallatin Auto Parts. Sometime around 1985 or 1986, the brothers sold the business and the Decedent received a promissory note from the sale in the amount of $426,00.00. Subsequent to the sale, the Decedent worked various odd jobs such as purchasing a used car lot, driving a transport bus for Sumner County inmates, working for Tommy Marlin, obtaining his real estate license, and working as an agent for A1 Realty. Mainly, however, the Decedent invested in real estate, selling and acquiring as many as sixteen properties. The testimony at trial was that each of his endeavors was funded with the sale of his interest in Gallatin Auto Parts and a $120,000 deed of trust, borrowed against the parties' marital home and farm. The various real property investments were bought and sold entirely in his name, save one property. The investment properties were not acquired for marital use. The spouses also established a joint banking account. Ms. Shults testified she wrote checks from her separate account, never the joint account. The testimonial evidence of the Decedent's children emphasized their father's money was his and their stepmother's money was hers.

A separate logical, and convincing, argument that the property was treated by the parties as separate is the issue of the testamentary trust's funding source. The Decedent's children testified at trial the trust was to benefit both them and their stepmother. We agree with this statement as the language in the will clearly indicates such. The children also argued if their father's investments, titled in his name, acquired during the marriage, were not treated as separate, the testamentary trust would essentially have no funding. We agree with the children's argument that their father intended to care for his wife and his children via the trust, which was funded with his continual real estate investing.

It is our opinion, the evidence is clear to establish the Decedent and his wife conducted their financial business, intentionally, separately. The property at issue was the husband's

continuous investment effort, originally funded by his separate property. By their actions, it is this Court's opinion the evidence does not preponderate against the Chancery Court's finding the Decedent's property, which was acquired during the marriage, but funded by his pre-martial property and titled solely in his name, was his and his alone.

Whether the trial court erred in its finding the Decedent intended to bestow the corpus of the testamentary trust, created by the Decedent's will, upon his biological children?

It is this Court's finding the Chancery Court did not err in its interpretation and instruction of the Decedent's last will and testament. Reading the Decedent's entire will as a whole, and incorporated antenuptial property agreement, this Court finds the proof clear and convincing the Decedent intended to create a trust. The proof is also clear and convincing the trust will be comprised of the Decedent's property titled solely in his name. In accordance with the Tennessee Uniform Trust Code, this Court finds it is lawful to reform the mistake of expression contained within section III of the Decedent's will, establishing a trust. Tenn. Code Ann. § 35-15-415. The mistake of expression is the Decedent's failure to include a term in which he intended to include – i.e. the beneficiary of the corpus of the trust. In deciding whether the evidence is clear and convincing, so as to allow reformation of the trust instructions, we examined the will as a whole and the extrinsic evidence produced at trial. In our examination, it was also imperative to examine the Decedent and his wife's antenuptial property agreement, which we find was incorporated by reference. The antenuptial property agreement is clear the parties intend to keep their pre-marital property separate while also providing for each other with retirement accounts and life insurance proceeds. The will is clear to fund the trust with the Decedent's separate property, and testimony at trial corroborated this fact. Therefore, in consideration of all the surrounding circumstances, it is clear and convincing to this Court the Decedent created a trust via his last will and testament, and within such trust instructions, he directed a charitable amount to his surviving wife, in addition to the amount he and she agreed upon within their antenuptial property agreement. It is also evident the Decedent mistakenly omitted what may have been obvious to him, the beneficiaries of the corpus of the trust. It is our opinion, the evidence is clear and convincing to show the Decedent intended his separate property, in the form of the corpus of the trust, to bestow upon his biological children. We therefore affirm the Chancery Court's reformation directing the corpus of the trust to such beneficiaries.

CONCLUSION

This Court affirms the Chancery's Court's findings it was the Decedent and his wife's intention to keep various properties categorized as separate. The maintenance of separate accounts and their joint account is proof the parties had purpose for their separateness. By the actions of the parties, maintaining the separateness, in title and accounts, it is this Court's opinion the various property titled solely in the Decedent's name, but acquired during the marriage, did not transmute into marital property. This Court also affirms the Chancery Court's order reforming the testamentary trust to read the biological children of the Decedent are the beneficiaries of such trust. Being so, the costs of this appeal are taxed against the appellant, Suzanne Shults.

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DON R. ASH, S.J.